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C. REMARKS

The Office Action dated September 9, 2004 finally rejects claims 1, 2, 4-9, and 11-35 under claim rejections based on 35 USC 103(a). Applicants request withdrawal of the finality of the Office Action dated September 9, 2004 because the main reference, Burg et al. (US Patent 6,738,473), upon which the rejections are based was not invented prior to the present invention.

The Examiner cites Burg et al (US Patent 6,738,473) as prior art in the rejection of claims 1, 2, 4-9, and 11-35 under 35 USC 103(a). "Before answering *Graham's* 'content' inquiry, it must be known whether a patent or publication is in the prior art under 35 U.S.C. § 102." *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568, 1 USPQ2d 1593, 1597 (Fed. Cir.), cert. denied, 481 U.S. 1052 (1987). Subject matter that is prior art under 35 U.S.C. 102 can be used to support a rejection under section 103. *Ex parte Andresen*, 212 USPQ 100, 102 (Bd. Pat. App. & Inter. 1981). When the reference is not a statutory bar under 35 U.S.C. 102(b), (c), or (d), applicant can overcome the rejection by swearing back of the reference through the submission of an affidavit under 37 CFR 1.131. *In re Foster*, 343 F.2d 980, 145 USPQ 166 (CCPA 1965).

First, the reference is not a statutory bar under 102(b). 35 U.S.C. 102(b) requires: the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. Burg's filing date is October 19, 2001. The filing date for the present invention is December 3, 2001. Since Burg's filing date does not precede the filing date of the present invention by more than 1 year, Burg does not create a statutory bar under 102(b).

Second, the reference is not a statutory bar under 102(a) or any other section of 102. Section (a) of 37 CFR 1.131 requires that when any claim of an application is rejected, the inventor of the subject matter of the rejected claim or the party qualified under sections 1.42, 1.43 or 1.47, may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claim prior to the effective date of the reference on which the rejection is based. In addition, section (b) of 37 CFR 1.131 requires "the showing of facts shall be such, in
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character and weight, as to establish reduction, or conception of the invention prior to the effective date of the reference coupled with due diligence from prior to said date to a subsequent reduction to practice or to the filing of the application.” Applicants file a first affidavit signed by the inventors with this paper in compliance with 37 CFR 1.131 states facts that show that prior to October 19, 2001, the inventors had completed the conception of the subject matter of rejected claims 1, 2, 4-9, and 11-35. A copy of the disclosure, which was submitted by the inventors, shows conception of the ideas included in the claims. In addition, as the dates show, Applicants followed the conception of the subject matter prior to the invention date with reasonable diligence by filing the application for a patent less than two months after the effective reference date. In addition, Applicants file a second declaration signed by Amy Pattillo indicating that two of the inventors were notified of the declaration, but unavailable before the filing date of this paper to provide signatures on the declaration. MPEP 715.04 (“Further where it is shown that a joint inventor is deceased, or refuses to sign, or is otherwise unavailable, the signatures of the remaining joint inventors are sufficient.”)

Therefore, because Burg cannot be used as prior art under 102, Burg also cannot be used as prior art under 103. Applicants respectfully request allowance of claims 1, 2, 4-9, and 11-35 which are rejected under Burg and Burg in view of the other references.

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Conclusion

In conclusion, Applicants respectfully request the withdrawal of the finality of the Office Action dated September 9, 2004 in view of the 1.131 declaration. Applicants invite the Examiner to set-up a phone conference or call at any time to discuss any of the issues raised in this paper.

The Commissioner is hereby authorized to charge or credit Deposit Account No. 09-0447 for any fees required or overpaid.

Respectfully submitted,

 ON 11/9/04

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